

**IN THE UNITED STATES DISTRICT COURT  
FOR THE SOUTHERN DISTRICT OF ILLINOIS**

**UNITED STATES OF AMERICA,**

**Plaintiff,**

**v.**

**JOHN McCRAY, Sr.,**

**Defendants.**

**No. 05-CR-30027-DRH**

**MEMORANDUM AND ORDER**

**HERNDON, Chief Judge:**

On July 6, 2009, John McCray, Sr., pro se, filed a motion under 18 U.S.C. § 3582(c)(2) for reduction of sentence based on retroactive guideline amendment, effective November 1, 2007, concerning cocaine base (“Crack”) (Doc. 297). The Court appointed counsel to represent McCray on the issue of a sentencing reduction in light of the amendments to the United States Sentencing Guidelines, and counsel has now moved to withdraw on the basis that he can make no non-frivolous arguments in support of a reduction pursuant to 18 U.S.C. § 3582(c). ***See Anders v. California, 386 U.S. 738, 744 (1967).*** McCray did not respond to the motion to withdraw, even though he was given an opportunity to do so.

Section 3582(c)(2) allows the Court to reduce a defendant’s previously imposed sentence where “a defendant . . . has been sentenced to a term of imprisonment based on a sentencing range that has subsequently been lowered by the Sentencing Commission pursuant to 28 U.S.C. 994(o).” In doing so, the Court

must consider the factors set forth in 18 U.S.C. § 3553(a) and must ensure that any reduction “is consistent with applicable policy statements issued by the Sentencing Commission.” **18 U.S.C. § 3582(c)(2)**. Thus, a defendant urging a sentence reduction under § 3582(c)(2) must satisfy two criteria: (1) the Sentencing Commission must have lowered the applicable guideline sentencing range, and (2) the reduction must be consistent with applicable policy statements issued by the Sentencing Commission. If the defendant cannot satisfy the first criterion, the Court has no subject matter jurisdiction to consider the reduction request. ***United States v. Lawrence*, 535 F.3d 631, 637-38 (7th Cir. 2008); see *United States v. Forman*, 553 F.3d 585, 588 (7th Cir.), cert. denied sub nom *McKnight v. United States*, 129 S.Ct. 1924 (2009).**

McCray cannot satisfy the first criterion because he was not “sentenced to a term of imprisonment based on a sentencing range that has subsequently been lowered by the Sentencing Commission pursuant to 28 U.S.C. 994(o).” **18 U.S.C. § 3582(c)(2)**. Amendments 706 and 711 amended U.S.S.G. § 2D1.1(c) as of November 1, 2007, to lower by two points the base offense levels associated with various amounts of crack cocaine. The Sentencing Commission amended U.S.S.G. § 2D1.1(c) intending to alter the disparity in sentences involving crack cocaine and sentences involving powder cocaine. The amendments did not, however, reduce the sentencing range of defendants whose minimum guideline sentence was determined under U.S.S.G. § 5G1.1(c)(2) based on a statutory minimum rather than under

U.S.S.G. § 2D1.1 based on relevant conduct amounts. **See Forman, 553 F.3d at 588** (“Nothing in § 3582(c)(2) permits a court to reduce a sentence below the mandatory minimum.”).

McCray’s sentencing guideline range was based on a 240 month *statutory* minimum. Because his sentence was based on a statutory minimum sentence in accordance with U.S.S.G. § 5G1.1(c)(2), not his base offense level set forth in U.S.S.G. § 2D1.1, the amendments did not lower his guideline range, and he cannot satisfy the first criterion under 18 U.S.C. § 3582(c)(2) for obtaining a sentence reduction. The Court lacks subject matter jurisdiction to consider his reduction request. **See Forman, 553 F.3d at 588; Lawrence, 535 F.3d at 637-38.**

The Court therefore **GRANTS** counsel’s motion to withdraw (Doc. 302) and **DISMISSES** the motion for sentence reduction (Doc. 297) for **lack of jurisdiction**.

**IT IS SO ORDERED.**

Signed this 2nd day of December, 2009.

/s/ David R. Herndon

**Chief Judge  
United States District Judge**